DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

SOUTHERN RY. CO. *v.* MASON.

June 8, 1916.

[89 S. E. 225.]

1. Railroads (§ 344 (1)*)—Injury at Crossing—Pleading—Independent Changes—Negligence.—In an action against a railroad for personal injury when struck by a train, the fact that two of the counts containing proper allegations of negligence combined them with statements as to obstructions to the view at the crossing, which latter conditions did not involve negligence, did not violate a rule of pleading by blending well-assigned with ill-assigned breaches of duty, since the allegations as to the obstructions to the view might be treated, not as independent charges of duty, but rather as descriptive of the conditions at the place of the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1107; Dec. Dig. § 344 (1).* 4 Va.-W. Va. Enc. Dig. 129.]

2. Railroads (§ 327 (8)*)—Injuries on Track—Contributory Negligence.—The driver of a horse and wagon approaching a railroad crossing must exercise care commensurate with the known danger, and listen and look in every direction to make sure that the crossing is safe, and his failure to look and listen when he had an unobstructed view from a point 90 feet from the track to a point 40 feet from the track and his approach to the track without looking and listening was negligence, although he did not actually see the approaching train, and although the railroad was negligent in failing to give signals of its approach.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1051; Dec. Dig. § 327 (8).* 4 Va.-W. Va. Enc. Dig. 136.]

3. Railroads (§ 351 (16)*)—Injuries on Track—Instructions—Modification.—In an action for personal injury when plaintiff's horse and wagon was struck by defendant's train, the modification of an instruction that plaintiff was bound to approach the crossing in the exercise of care commensurate with the known danger and to listen and look in every direction to make sure that the crossing was safe, and that, if he had an unobstructed view of the track when 90 feet away, and so on until within 40 feet away, which, had he looked and listened,

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

would have warned him of the approach of the train, and approached the track without doing so, he was negligent, by striking out the word "track" and the words "when 90 feet away, and thence in the direction of the track for a distance of approximately 40 feet," before the word "and," was improper; as, instead of making it plain that the obstructions near the track would not excuse plaintiff's negligence in not looking before he reached them, it left the jury to assume that unless he had a totally unobstructed view, the duty would not apply.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1208; Dec. Dig. § 351 (16).* 4 Va.-W. Va. Enc. Dig. 136.]

4. Railroads (§ 346 (5)*)—Injuries on Track—Burden of Proof.—In an action by the driver of a horse and wagon for personal injury when struck by defendant's train, in which defendant relied upon the defense of contributory negligence, and had grounds for claiming that such negligence appeared from the plaintiff's evidence, the burden was upon the plaintiff to relieve himself of the suspicion of his own negligence, and not upon the defendant to show plaintiff's negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1121; Dec. Dig. § 346 (5).* 10 Va.-W. Va. Enc. Dig. 406.]

5. Trial (§ 296 (7)*)—Instructions—Cure by Other Instructions.—The fact that other instructions told the jury that contributory negligence would bar a recovery did not cure the error in instructing that the burden was upon the defendant to show the contributory negligence relied upon to the satisfaction of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 710; Dec. Dig. § 296 (7).* 7 Va.-W. Va. Enc. Dig. 744.]

6. Trial (§ 252 (9)*)—Instruction—Applicability to Evidence.—Where the established facts showed that defendant, after seeing the plaintiff's team on its track, or after it could have seen him by the exercise of due care, could not possibly have avoided the accident, an instruction submitting the issue or theory of discovered peril or last clear chance was erroneous, as being without support in the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. § 252 (9).* 7 Va.-W. Va. Enc. Dig. 718.]

7. Appeal and Error (§ 1050 (1)*)—Prejudicial Error—Admission of Evidence—Effect of Other Evidence.—The admission of evidence to show that plaintiff was a careful and cautious driver and an industrious and energetic boy was prejudicial, notwithstanding the plaintiff testified positively to his own care and caution at the time, and no witness testified to the contrary, where there were facts and circumstances which would have fully sustained a verdict for defendant based upon plaintiff's contributory negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

§§ 1068, 1069, 4153, 4157; Dec. Dig. § 1050 (1).* 1 Va.-W. Va. Enc. Dig. 592.]

8. Railroads (§ 347 (11)*)—Admissibility—Habits.—In such case the matter and substance of such evidence did not bring it within the rule of admissibility relating to individual habits, as distinguished from character and reputation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1134-1137; Dec. Dig. § 347 (11).* 5 Va.-W. Va. Enc. Dig. 313.]

9. Evidence (§ 588*)—Weight—Physical Facts.—Where the undisputed physical facts clearly established by the evidence are contradicted by the oral testimony of the witnesses, such testimony must be disregarded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588; Witnesses, Cent. Dig. § 1164.* 5 Va.-W. Va. Enc. Dig. 322.]

Error to Circuit Court, Fauquier County.

Action by E. M. Mason against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and cause remanded for new trial.

Moore, Keith, McCandlish & Hall, of Fairfax, and *R. B. Tunstall,* of Norfolk, for plaintiff in error.

Grimsley & Miller, of Culpeper, and *A. D. Kelly,* of Remington, for defendant in error.

VIRGINIA RY. & POWER CO. *v.* DAVIDSON'S ADM'R.

June 8, 1916.

[89 S. E. 229.]

1. Street Railroads (§ 81 (2)*)—Injuries—Basis for Recovery.—That a street car company employed and retained a careless motorman furnishes no basis for recovery for the death of one run down by a street car, but some affirmative negligence must be shown.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 177; Dec. Dig. § 81 (2).* 10 Va.-W. Va. Enc. Dig. 359.]

2. Appeal and Error (§ 232 (1)*)—Objections Not Made Below.—Though defendant sought to have the jury instructed to disregard a count of the declaration, he cannot, having failed to urge it below, attack the count on appeal as uniting good and bad grounds for recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1368, 1430; Dec. Dig. § 232 (1); Trial, Cent. Dig. §§ 691, 692.* 1 Va.-W. Va. Enc. Dig. 547.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.